IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 17, 2007 Session

STATE OF TENNESSEE v. JOSEPH OWEN SMITH

Appeal from the Circuit Court for Dickson County
No. CR7482 Robert E. Burch, Judge

No. M2006-02116-CCA-R3-CD - Filed June 29, 2007

The Defendant, Joseph Owen Smith, pled nolo contendere to criminally negligent homicide in connection with the death of Jeffery Ray Doss. Following the sentencing hearing, the Defendant received a one year sentence, with six months to be served in the county jail and six months to be served on probation. On appeal, the Defendant argues that the trial court erred by denying him "full probation." We conclude that the trial court did not err by ordering split confinement in this case. However, based upon the Defendant's classification as a Range I, standard offender, we conclude that the Defendant may only be required to serve 30% of his sentence in incarceration. Therefore, we remand for the entry of a judgment reflecting that the Defendant shall serve no longer than 30% of his term of one year in confinement and the remainder to be served on probation.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part; Remanded

DAVID H. WELLES, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

Michael J. Flanagan, Nashville, Tennessee, for the appellant, Joseph Owen Smith.

Robert E. Cooper, Jr., Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Dan. M. Alsobrooks, District Attorney General; and Ray Crouch, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case arises from the death of the victim Jeffery Ray Doss, from severe burns and injuries following an altercation in Dickson County, Tennessee in June of 2003.[1] The facts surrounding the offense were summarized by Detective John L. Patterson of the Dickson County Sheriff's Department:

> On June 21, 2003, [the Defendant] and Jeffery Ray Doss had been in a verbal altercation. Mr. Doss told [the Defendant], by telephone, that he (Doss) was coming to [the Defendant's] residence to get his motorcycle and to whip [the Defendant's] ass. [The Defendant] went outside and saw Doss coming across his . . . front yard. [The Defendant] had earlier placed a 1 [pound] coffee can ½ full of gas by his back door. As Doss got close to [the Defendant], [the Defendant] threw the gas from the can, with his left hand, onto Doss and held up a bic lighter with his right hand, striking the lighter. Doss then jumped off the retaining wall landing on [the Defendant], setting them on fire. Doss later died from his burns.

The Defendant was indicted by a Dickson County grand jury for voluntary manslaughter, a Class C felony. See Tenn. Code Ann. § 39-13-211. Subsequently, the Defendant pled nolo contendere to criminally negligent homicide, a Class E felony. See id. § 39-13-212.

The trial court held a sentencing hearing on September 11, 2006. The victim's sister, Jennifer Doss Lynch, testified that she did not see the altercation that led to her brother's burns but arrived at the Defendant's residence shortly afterwards. She stated that witnesses told her that the victim had "been burned really bad." Ms. Lynch stated that, when she saw the victim,

> [h]e was sitting with his back to me and it was kind of red on the back; but as I got closer to him, his arms were resting on his knees and blacken[ed] skin was dripping off of his arms. His lips were black and he was shaking, quivering . . . .

Ms. Lynch testified that the victim told the police that the Defendant was responsible for his burns. Ms. Lynch also stated that she heard the victim ask, "why did you burn me, Joe. You're my best friend."

Mrs. Lynch stated that the victim was transferred via helicopter to Vanderbilt Medical Center's burn unit. She testified that he underwent treatment for "[s]ix weeks and three days" and

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[1] We note that the legislature has recently amended several provisions of the Criminal Sentencing Reform Act of 1989, said changes becoming effective June 7, 2005. However, the Defendant's crime in this case occurred prior to June 7, 2005, and the Defendant did not elect to be sentenced under the provisions of the Act by executing a waiver of his ex post facto protections. See 2005 Tenn. Pub. Acts ch. 353, § 18. Therefore, this case is not affected by the 2005 amendments, and the statutes cited in this opinion are those that were in effect at the time the instant crime was committed.

then died in the hospital. She stated that she believed the victim regained partial consciousness "at least once" because there was "alertness and awareness in his eyes." However, the victim was "never allowed" to speak because of his "tracheotomy."

Mrs. Linda Nolan Doss, the victim's mother, testified about her recollection of the events of June 21, 2003:

> When I arrived in the yard, my son was sitting on the ground; and he said, Joe, man, you're my best friend, how could you burn me like this? And then [Ms. Lynch] . . . started pouring water on him to keep him cool until the ambulance got there; and he was sitting there on the ground and he had gotten over on his hands and knees because he was in such pain; and the flesh was falling off of his bones just—and he lost quite a bit of flesh there at the scene.

Mrs. Doss also testified about the victim's injuries and medical treatment following the incident:

> I stood by my son's bedside and watched him rot. He had bone and a little bit of muscle on his left leg, that's all that was left. The skin grafts didn't take. His whole left arm looked like it had gangrene. It took . . . awhile and then—and when he died, he had five infections on his body. He had been moaning from the second day on.

On behalf of the defense, Detective John L. Patterson of the Dickson County Sheriff's Department testified that he was the "case agent" that investigated the victim's death. Detective Patterson stated that a "large" portion of his investigation was based upon the Defendant's statements to him in "five or six" meetings; Detective Patterson was unable to interview the victim prior to his death.

Detective Patterson stated that the victim and the Defendant "had been in an argument the previous night." Detective Patterson testified that during his investigation he determined that the victim had been calling the Defendant throughout the day of June 21, 2003 and, "[a]pparently there were some words exchanged" in these telephone conversations.

According to the Defendant's statement to Detective Patterson, the victim wanted to pick up his motorcycle from the Defendant's property, and he told the victim "not to come and get the motorcycle while he was there." The victim then "called back again and told him that he was going to come over and get the motorcycle." During this phone call, the victim made "threatening statements" and told the Defendant that he would "whip [his] ass." Detective Patterson testified that the telephone records corroborated that calls were made between the Stevenson residence, where the victim had been throughout the day, and the Defendant's residence.

The Defendant further recounted to Detective Patterson that, following these phone calls, he saw the victim "approaching" his residence. The Defendant stated that, as he saw the victim coming across his yard, "[h]e was telling him, not to come any closer." The Defendant stated that "he had a can that had gasoline in it because he had been cleaning parts or things and tools. As [the victim] approached, [the Defendant] said he threw the gasoline on [the victim]." The Defendant stated that he did so "to keep [the victim] away." The investigation showed that the victim was about "six and a half feet" from the Defendant at that time. The Defendant stated that he was "[t]rying to throw it in his face" in order to "blind him." The gasoline, in actuality, soaked the victim's stomach and chest and did not hit his face.

Detective Patterson then testified that the Defendant told varying stories about what transpired after he threw the gasoline onto the victim. Detective Patterson stated that, "initially, [the Defendant] said that he had a cigarette in his hand, that [the victim] had jumped off the retaining wall, landed on him colliding with the cigarette, which caused sparks and set [the victim] on fire. Some of the gas transferred to [the Defendant] and set him on fire." Ultimately, the Defendant stated that the fire was set from the "lighter" that was in his right hand. The Defendant stated that he "pulled the lighter [out] of his pocket to show [the victim] he had a lighter . . . [so he would not] come any closer."

Detective Patterson stated that the evidence did show that the victim "kept coming towards" the Defendant after the Defendant threw the gasoline and eventually "came over the retaining wall" onto the Defendant. At this point, the Defendant stated that "he took the lighter out of his pocket and held it out and struck it." According to Detective Patterson, the physical evidence "demonstrate[d] that in fact [the victim] came off the wall, on to [the Defendant] in the driveway, and they both went up in flames[.]"

Detective Patterson stated that, after the fire engulfed both the victim and the Defendant, the Defendant was able to "roll in the grass" on the other side of a fence to put the fire out. He then was attacked and hit several times by Terry Stevenson, a mutual friend of the Defendant and the victim, apparently for his role in igniting the victim's body. The Defendant entered his garage to get a pan to fill with water to pour on the victim. The Defendant then stayed inside his home until the police arrived.

Detective Patterson testified that the victim's toxicology report demonstrated the following substances were present in his system: "compounds found in marijuana"; benzodiazepine; oxycodone; morphine; and ethanol.

Michael Duncan, a neighbor of the Defendant and the victim, stated that he knew the victim and the Defendant and that he had not known of any problems between the two. Mr. Duncan testified that, on June 21, the Defendant told him that the victim "had been smarting off to him that day . . . ." Mr. Duncan stated that he told the Defendant to "have nothing to do with him or something like that, and not to pay him no attention. You know, leave him alone." Mr. Duncan testified that, later that day, his wife told him to go to the Defendant's residence because something

had happened. Mr. Duncan testified that, when he arrived, he saw the victim "smoldering" in "the gravel of [the Defendant's] driveway." Mr. Duncan then stated that he saw Mr. Stevenson and the Defendant fighting and that he pulled Mr. Stevenson off of the Defendant.

Kay Duncan, Mr. Duncan's wife, testified that she "heard some yelling back and forth from [the Defendant's] house and [Mr. Stevenson's] house, which is right across the street . . . ." Mrs. Duncan stated that she initially believed that there was "going to be a conflict." Mrs. Duncan stated that she heard the Defendant say, "I'm telling you do not come over on my property. I do not want you to step foot on my property." Mrs. Duncan said that the Defendant continued repeating this to the victim. Mrs. Duncan said that she could not understand anything that the victim, who she said was "like a son" to her, was saying.

Mrs. Duncan said that she then saw the victim "starting across the street—walking across the street" from Mr. Stevenson's house to the Defendant's house. She stated that he was "in sort of a fast pace, not running and not walking." Mrs. Duncan said that she saw the victim go into the Defendant's yard and then could not see anything else until she saw the Defendant "going across the fence on fire."

Mrs. Duncan said she immediately decided that she had "to do something" and just "ran into the backyard and yelled" at her husband. Mrs. Duncan testified that she followed her husband as he rushed "up the hill" to the Defendant's residence. Mrs. Duncan stated that, when she arrived, the victim was "smoldering" but "he was coherent enough to get over against the concrete barrier wall."

Mrs. Duncan testified that the victim "looked at me and [Mr. Duncan] and he said, he burned me. And he said, get some water and pour some water on me; and so, after he said that then [the Defendant] said, there's a pan or a bucket right over there and he pointed over there." Mrs. Duncan stated that she left the scene at this point.

Mrs. Lockey Smith, the Defendant's wife, testified that, on the night before the incident, the victim and Mr. Stevenson had gotten into a disagreement because the victim "took the pellet gun and was shooting [Mr. Stevenson's] beers before [Mr. Stevenson] could even open it; and then a fight broke out" between Mr. Stevenson and the victim. According to Mrs. Smith, who was not present during this incident but recounted her husband's version of events, the Defendant attempted to "break it up." Mrs. Smith stated that, after her husband helped break up the fight, the victim "jumped up and said, you're next old man." Mrs. Smith stated that her husband told the victim, "no, I don't want to fight you. We're not going to fight." Mrs. Smith stated that her husband "came right home" after that. Mrs. Smith stated that her husband later left their residence because he was "scared" and "upset . . . ."

Mrs. Smith testified that, the next day, she was not at home when the altercation occurred. Mrs. Smith stated that she received a telephone call from her husband saying that he needed "to go to the hospital" and to "call 911." When she arrived, she saw that the victim and the Defendant were burned.

Mrs. Smith stated that the Defendant had been "destroyed" following the incident because "[the victim] was a friend. He didn't want to hurt a friend." Mrs. Smith said that the Defendant "rarely cries" but that "he cried" over the loss of the victim. Mrs. Smith stated that he was distraught because "his friend was gone and he—it happened because of him."

Mrs. Smith also testified that her husband had been a "loving and supportive husband" for twenty-eight years, had "been regularly and gainfully employed[,]" and had been a "supportive father" to their two children.

Mrs. Katherine Smith, the Defendant's mother, testified that her son was "basically a very good boy" growing up and always took care of his three younger siblings. Mrs. Smith stated that the Defendant dropped out of high school in the eleventh grade and enlisted in the United States Navy. He eventually married and "used his veterans benefits to go to school at Nashville Tech. [for] auto body repair work . . . ." Mrs. Smith stated that the Defendant was always gainfully employed and was "basically . . . very well behaved." Mrs. Smith stated that the Defendant "was always there with his children and he is always there for them and with them." Mrs. Smith stated that the Defendant was always helping people in his neighborhood, including during a time when a tornado struck their area and when neighbors were ill. Mrs. Smith stated that the Defendant had never in his life been in trouble with the law.

Mrs. Smith stated that the Defendant was seriously injured from the altercation with the victim and "sustained second and third degree burns over . . . twenty-five percent of his body. It was his right arm, shoulder area, into the back, the chest and the entire arm was severely burned and required several skin grafts to repair." Mrs. Smith stated that he spent five days in the hospital to treat his injuries. Mrs. Smith stated that one of the Defendant's first statements to her was to inquire as to how the victim was doing.

Mrs. Smith stated that, since the victim's death, the Defendant has been under "tremendous strain. He hasn't slept well. He's lost some weight . . . ." With regard to his mental health, Mrs. Smith opined that the Defendant had "been somewhat depressed" and did "cry like a baby because his best friend died."

Mr. Ronald Dunn, Jr. testified that he knew the Defendant for "three to four years"in his capacity as a construction worker. Mr. Dunn testified that the Defendant built his son's home, repaired his daughter's home, and did renovations at their home and lake house. Mr. Dunn testified that the Defendant is "impeccable" and "extremely trustworthy." Mr. Dunn testified that the Defendant "is of excellent character" and did not have "any kind of violent tendencies."

Mr. Robert Truett testified that he is a preacher at the Dickson Cumberland Presbyterian Church, where the Defendant's wife and son were members of the congregation. Mr. Truett testified that he became involved in the Defendant's life after the altercation with the victim. Mr. Truett stated that he had "counselled [sic] with him on numerous occasions" because his wife "was worried about him . . . ." Mr. Truett stated that he was certain the Defendant was "experiencing remorse"

and that it was "sincere[.]" Mr. Truett stated that the Defendant "wept on a number of occasions" and "it was a really difficult thing for him."

Mr. Ricky Sanders, the owner of S & S Contracting, testified that the Defendant was an employee at his business. Mr. Sanders testified that he had known the Defendant for "about four years" and that the Defendant was "very dependable, very honest, [and] very trustworthy." Mr. Sanders testified that, even since the incident involving the victim's death, he has allowed the Defendant to continue working with his company.

The Defendant testified that, on the evening before the altercation, the victim and another neighbor, Mr. Stevenson, got into an argument about the victim shooting his beer cans with a pellet gun. The Defendant stated that the victim looked at him and said, "you're next old man." The Defendant stated that the victim "had said this to me before when he was inebriated and it started to worry me." The Defendant stated that he was concerned that the victim "actually did want to try and fight with me" and that he did not want to fight with the victim. The Defendant stated that he was further concerned that the victim wanted to hurt him because he blamed the Defendant for causing a leg injury that occurred in a motorcycle accident in 2003.

The Defendant testified that, following that evening, he "made [his] mind up" that he did not want to be around the victim any longer. When the victim called the Defendant on the morning of June 23 between 9:00 and 10:00 a.m., the Defendant stated that he only continued speaking with him as long as there was "no more of this belligerent stuff." The Defendant stated that the victim "got mad and he said, oh, you and [Mr. Stevenson] need to grow up." The Defendant testified that he then "just hung the phone up on him." The victim then immediately called back, and he "hung it up" again. Following these telephone conversations, the victim came to the Defendant's home to return "all of the tools that he had borrowed" and left them in the lower driveway. The Defendant then moved the victim's motorcycle from his backyard into his driveway for the victim to pick up.

At around 5:30 that evening, the Defendant was outside cleaning some tools with gasoline when the victim called again. The Defendant noticed that the victim was "plastered" and the victim "was cussing" at the Defendant. The Defendant testified that the victim wanted to get his motorcycle and that he replied that the motorcycle was outside and the victim could "come and get it" when he was not at home. The Defendant stated that the victim "was cussing and talking about how he was going to stomp my tail and all this stuff." The Defendant stated that he again "hung up" on the victim.

The Defendant testified that the victim called back again and stated that he wanted his motorcycle and was going to "whip" the Defendant's "butt[.]" Once again, the Defendant stated that he hung up. The Defendant stated that he did not "want to get into it" with the victim and was "not going to argue with a drunk . . . "

The Defendant testified that, after this phone call, he was "pretty nervous" and decided to light a cigarette. The Defendant stated that, about "thirty or forty-five seconds" after he began

smoking the cigarette, he "heard this commotion going on outside." The Defendant stated that he "started to head for the door, the can of gas was sitting out there, laid the cigarette back down and headed on outside." The Defendant stated that the lighter was still in his pocket.

The Defendant testified that he saw the victim across the street at Mr. Stevenson's house "mouthing off something." The Defendant stated that the victim started coming towards his residence and that he told the victim to "get off the property" and not to "come in my yard." The Defendant realized the victim was not "heading towards the bike" but was walking towards the Defendant himself, and he also heard the Defendant "cussing . . . and saying he's going to kick my butt." The Defendant stated that the victim "was doubling up his fists and he had a look in his eyes" that he had never seen that was full of "rage" and "really scared" the Defendant. The Defendant stated that the victim was "walking at a good trot" and was crossing the front yard of his home. The Defendant stated that the victim "looked like he was fixing to just destroy something and it scared the daylights out of me; and I panicked."

The Defendant stated that, at this point, he "couldn't think of what to do." He stated that he did not believe he had enough time to close himself into the basement securely. Therefore, he decided to throw gasoline in the victim's eyes to "blind" him. The Defendant stated that he threw the gasoline with his left hand even though he was right-handed and therefore he did not "get the gas in his eyes" but "splattered [it] upon his chest." The Defendant stated that he then "stepped back with the lighter" and "held the lighter up for him to see; and I lite [sic] the lighter so that he could see that I was serious." The Defendant stated that the victim "never stopped" and "was on top of me before I could even get away from him." The Defendant stated that the victim "ignited when he got within a foot or two" of him and that the victim then came "down on top of me." The Defendant stated that their bodies then both ignited on fire.

The Defendant stated that he was able to put out the flames on his own body and tried to get to the victim "to help . . . ." The Defendant stated that he knew he had gasoline on his body and did not want "to ignite" again so he removed his shirt to attempt to aid the victim who was "still on fire." The Defendant stated that, instead, Mr. Stevenson "sucker punched" him. The Defendant stated that Mr. Duncan stopped Mr. Stevenson from attacking him and that he then went to find something to "smother the flames" that were burning the victim's body. The Defendant then assisted by getting a pan to fill with water to "put him out." The Defendant stated that he then went into the garage to get a "sleeping bag wrapped around him and get help." He stated that Mr. Stevenson then continued attacking him and that Mr. Duncan stopped him again. The Defendant stated that he then secured himself inside his house, called his wife, and instructed her to call 911. The Defendant testified that he never intended to harm the victim throughout the altercation.

With regard to the discrepancy in the Defendant's statements regarding whether he had a cigarette or a lighter in his hand, the Defendant testified that

> I could not—I could not realize that I had the lighter out. I don't know why. I just—I felt like I had a cigarette. I remember lighting a cigarette; and then talking

> with the state Fire Marshall for awhile and another gentleman named Mr. Gentry, we talked it over for awhile; and it was kind of like a counselling [sic] session. They brought to light something that I hadn't realized I had a lighter that day; and I just didn't—I guess I blocked it out. I don't know. I don't want to think about it or anything.

The Defendant further stated that he was not certain he really did have a lighter because he could not

> figure out how I managed to hang on to that lighter, jump over the fence, get knocked over the fence, get back in my basement after pulling my shirt off, you know, and being burning all this time. I still don't understand how that lighter managed to get laid back right on my work table next to my cigarettes and the phone . . . without being so much scarred or charred.

The Defendant stated that he "realized that maybe it was a lighter" but stated that he was still "not sure . . . ." He testified that the investigators believed it was a lighter because of "how the fire works and all this stuff . . . . " The Defendant did point out that, although the fire investigators did many tests with mannequins, they doused a shirt with gasoline and the victim was not wearing a shirt. The Defendant also testified that he had no idea the temperature of the test room but that the altercation occurred on a "hot June day" and "at certain temperature[s] gas would ignite much quicker."

The Defendant testified that, when the victim died, it was "the worst day of [his] life." The Defendant stated that he missed the victim "[m]ore than anybody will ever know." The Defendant addressed the victim's mother and stated

> I'm terribly sorry. I've wanted to talk to you for three years and I haven't been able to because I didn't know how to approach you. You lost your son. I lost my best friend. I'll go to my grave believing that I could have done things differently. I know that if I had come to you sooner . . . or somebody we could have gotten this straightened out before it ever got this bad; and I am so sorry. I can't help but be sorry.

On cross-examination, the Defendant admitted that he did know that fire would ignite gasoline, he did intentionally throw gasoline at the victim, and he did hold a lighter. The Defendant claimed that it was a "moment" of "pure chaos." The Defendant stated that he did not intentionally set the victim's body on fire but that he "couldn't let go of the lighter quick enough" as the victim came towards him.

Agent Robert L. Pollard testified that he was a fire marshal and was involved in investigating this case. Agent Pollard stated that copies of investigative reports given to defense attorneys in November of 2004 did not contain certain portions that were included in the agent's copies of the

report from July of 2004. The missing statements included that the State showed video-taped evidence to the victim's family showing how the fire may have ignited based upon tests for the Bureau of Alcohol, Tobacco, and Firearms. The missing statements also included that an agent noted that they should inquire as to whether it made a difference that the mannequin in those tests was wearing a shirt and the victim was not. Agent Pollard testified that he had "absolutely no idea why [these statements] were taken out." On cross-examination, Agent Pollard stated that "there was absolutely no deception" and believed all the reports were accurately provided to the defense during discovery.

Agent Vagan, who was also a fire marshal, testified that he did not know why certain statements would have been missing from the defense attorney's copies of the report. Agent Vagan stated that he did not know who took these statements out of the report.

Following the hearing, the trial court made the following findings and determinations:

> The Court in sentencing this defendant takes into account and is guided by the principals [sic] cited in the Tennessee Criminal Sentencing Reform Act of 1989. The purposes of this Act are to ensure that every defendant shall be punished by the imposition of a sentence justly deserved in relation to the seriousness of the offense. To ensure fair and consistent treatment of all defendants by eliminating unjustified disparate in sentencing and providing a fair sense of predictability of the criminal law and it's [sic] sanctions.
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> Punishment shall be imposed to prevent crime and promote respect for the law by (a) providing effectual general deterrent to those likely to violate the criminal laws of this state; (b) restraining defendants with a lengthy history of criminal conduct; (c) encouraging effective rehabilitation of those defendants, where reasonable [sic] feasible, by promoting the use of alternative sentencing and correctional programs and elicit voluntary cooperation of defendant; and (d) encouraging restitution to victims where appropriate.
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> Sentencing should exclude all considerations respecting race, gender, creed, religion, national origin and social status of the individual. In recognition that state prison capacities and funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories, [evidencing] a clear disregard for the laws and morals of society and [evidencing] failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration. And a defendant who does not meet the above criteria and is either a especially mitigating offender or a standard offender convicted of a Class "C", "D" or "E" felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.

In addition to those purposes the following principals [sic] are contained in the Criminal Sentencing Reform Act which the Court applies in this case. Sentences involving confinement should be based on the following considerations, confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct. Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrent to those likely to commit similar offenses or measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

The sentence imposed should be no greater than that deserved for the offense committed. Inequalities in sentences that are unrelated to a purpose of this chapter should be avoided.

The sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence was imposed. The potential or the lack of potential for the rehabilitation or treatment of a defendant should be considered in determining the sentence alternative or length of a term to be imposed. The sentence of a term of probation may reflect the length of a treatment or rehabilitation program in which participation is a condition of the sentence; and trial judges are encouraged to use alternatives to incarceration that include requirements of reparation, victim compensation, and/or community service.

In this case, the Court finds the fact[s] to be as follows; the deceased in this case was undoubtedly the aggressor. He came over to the defendant's home and advanced upon him. The defendant acted in self-defence [sic]; however, he acted in self defence [sic] out of proportion to the threat to him. To throw gasoline on another person and to hold a lighter in proximity to that person is reckless in the extreme. It meets the definition of criminal negligence of which the defendant has entered a plea of no contest. Any person with common sense would know that this conduct would easily cause death or serious bodily injury. The defendant in this case is more aware than most about the explosive characteristic of gasoline or particularly gasoline vapors because of his training in the Navy.

The conduct of this defendant was so far outside the limits of civilized behavior as to be considered horrible. The defendant knew or should have known that his conduct would not only result in death or serious bodily injury, but would result in a horrifying, lingering, excruciatingly painful death.

The defendant has entered a plea of no contest to criminally negligent homicide. The statute sets up certain parameters under which this Court must function, under the Tennessee Criminal Sentencing Reform Act. Criminally negligent homicide is defined in the Act as a Class "E" felony. The Class "E" felony

range of punishment is not less than one, no more than six years in the state penitentiary.

In this case no notice of enhancement has been filed; and the parties have stipulated that the defendant is a range one or standard offender. Under the Criminal Sentencing Reform Act the range of punishment for a Class "E" felony, range one offender is not less than one nor more than two years in the state penitentiary.

Under the Criminal Sentencing Reform Act, the Court is required to consider the presumptive sentence, in other words, if no other facts occur, the Court is required to presume that the sentence shall be the minimum, that is one year. Therefore, we start out with one year and enhancing factors are presented to the Court to enhance the sentence up from one year, mitigating factors are presented to the Court to bring the sentence back down towards the minimum. No enhancers have been presented to the Court by the state.

Mitigators, the Court[ ] finds several to have been presented to apply. One, this defendant has no prior record; and the Court accords that medium weight. He has been regularly employed and is an honorably discharged veteran, which is accorded medium weight. Strong family ties to the community, which is accorded medium weight. The defendant acted under strong provocation which is accorded medium weight; and there are substantial grounds for excusing the defendant's conduct but not constituting a defense; and I find that is somewhat true; but more cumulative to some of the others that have been found.

It is unlikely that a sustained intent to violate the law motivated the defendant's conduct, which is true; and that the defendant acted under duress; and the Court finds that that is not found except in conjunction with the other mitigators.

That being the case there are numerous mitigators, although, not given particularly great weight. There are no enhancers, therefore, under the law the required sentence will be the minimum of one year.

The defendant under the Criminal Sentencing Reform Act is presumed to be a favorable candidate for [a] suspended sentence in absence of evidence to the contrary. In other words the burden is on the state to show that he should not receive a suspended sentence.

The Court finds that to suspend this entire sentence would unduly depreciate the seriousness of this offense. [Defense counsel] is right in stating that the Court could not and should not and does not refuse to suspend a sentence simply because a death has occurred. If that were true, then there would be no suspended sentence for any type of criminal homicide; and the Court considers suspending sentences in

situations in which death has occurred. But the circumstances of this death were known to the defendant to be so potentially horribly [sic] and painful that it just would—as I say, depreciate the seriousness of the offense to suspend the entire sentence.

The defendant I believe is generally remorseful. He's not very adapt at showing it, but many men of our generation aren't; and I find that he is remorseful; but more importantly I have a number of defendants that are remorseful but what they are remorseful for is they are going to prison. I don't see that here. I think he is generally remorseful for what has happened.

I do find the defendant to be untruthful about the incident particularly about the lighter involvement. He goes back and forth between not remembering what he did with the lighter and being very detailed about what he did with the lighter; and I believe that this defendant had the lighter, had it in his hand and struck that lighter as the deceased advanced upon him; and to do that just shows total disregard for the safety of other people; and he caused these consequences which occurred.

I find that a sentence of split confinement is appropriate here; and that being the case, the Court denies the petition for Judicial Diversion. He does meet the statutory qualifications; but it is not appropriate when—Judicial Diversion obviously is not appropriate when the proper sentence is split confinement.

. . . .

Joseph Owen Smith, upon your plea of no contest to the crime of criminally negligent homicide it is the judgment of this Court that you be sentenced to one year in the county workhouse and ordered to pay the costs of the cause. Your sentence is suspended after you have served a total of six months and you are placed on probation for the balance of your sentence.

The trial court entered judgment accordingly.[2] It is from the trial court's sentencing determination that the Defendant now appeals.

Analysis

The Defendant's sole issue on appeal is that the trial court erred in not granting him "full probation" and "suspending the one year sentence that was imposed." Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e)

[2] The judgment form does not indicate the Defendant's offender status or release eligibility.

evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; and (f) any statement the defendant wishes to make in the defendant's own behalf about sentencing. See Tenn. Code Ann. § 40-35-210(b); State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002). To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. See State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001).

Upon a challenge to the sentence imposed, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. See Tenn. Code Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then the presumption is applicable, and we may not modify the sentence even if we would have preferred a different result. See State v. Fletcher, 805 S.W. 2d 785, 789 (Tenn. Crim. App. 1991). We will uphold the sentence imposed by the trial court if (1) the sentence complies with the purposes and principles of the 1989 Sentencing Act and (2) the trial court's findings are adequately supported by the record. See State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). The burden of showing that a sentence is improper is upon the appealing party. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments; Arnett, 49 S.W.3d at 257.

A defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who "is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6); see also State v. Fields, 40 S.W.3d 435, 440 (Tenn. 2001). The following considerations provide guidance regarding what constitutes "evidence to the contrary" which would rebut the presumption of alternative sentencing:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . . .

Tenn. Code Ann. § 40-35-103(1); see also State v. Hooper, 29 S.W.3d 1, 5 (Tenn. 2000).

Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. See Tenn. Code Ann. § 40-35-103(2), (4). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence. See id. § 40-35-103(5).

A defendant is eligible for probation if the actual sentence imposed upon the defendant is eight years or less[3] and the offense for which the defendant is sentenced is not specifically excluded by statute. See Tenn. Code Ann. § 40-35-303(a). The trial court shall automatically consider probation as a sentencing alternative for eligible defendants; however, the defendant bears the burden of proving his or her suitability for probation. See id. § 40-35-303(b). No criminal defendant is automatically entitled to probation as a matter of law. See id. § 40-35-303(b), Sentencing Commission Comments; State v. Davis, 940 S.W.2d 558, 559 (Tenn. 1997). Rather, the defendant must demonstrate that probation would serve the ends of justice and the best interests of both the public and the defendant. See State v. Souder, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002).

In determining whether to grant probation, the court must consider the nature and circumstances of the offense; the defendant's criminal record; his or her background and social history; his or her present condition, both physical and mental; the deterrent effect on the defendant; and the defendant's potential for rehabilitation or treatment. See id. If the court determines that a period of probation is appropriate, it shall sentence the defendant to a specific sentence but then suspend that sentence and place the defendant on supervised or unsupervised probation either immediately or after the service of a period of confinement. See Tenn. Code Ann. §§ 40-35-303(c), -306(a).

The presentence report reflects that, at the time of sentencing, the Defendant was fifty years old, married, and had one child, a twenty-two year old son. He completed the tenth grade and had some training in automobile body repair and painting. He served four years in the United States Navy and reported steady employment, most recently as a site foreman for a contractor earning $20.00 per hour. He reported a history of marijuana use and had one conviction for misdemeanor possession of marijuana.

In this case, the Defendant's sole argument is that the trial court should have granted "full probation" and suspended his entire sentence rather than ordering split confinement. As we have stated, a defendant who is eligible for probation bears the burden of proving his or her suitability for full probation. See Tenn. Code Ann. § 40-35-303(b). In this case, it is apparent from the record that the trial court based the denial of full probation primarily upon the nature and circumstances of the offense. In order for probation to be properly denied based solely on the nature of the offense, the

[3] The legislature has subsequently modified probation eligibility to sentences of ten years or less. See 2005 Tenn. Pub. Acts ch. 353, § 7.

criminal act, as committed, must be "especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree." State v. Cleavor, 691 S.W.2d 541, 543 (Tenn. 1985). Otherwise stated, the nature of the offense must outweigh all factors favoring probation. Id. The trial court obviously found that the facts underlying the Defendant's crime were sufficient to justify a denial of probation based upon this standard. We conclude that the record before this Court supports and justifies the trial court's finding. In addition, the trial court found that the Defendant, in his testimony at the sentencing hearing, had been untruthful about the incident as it related to his use of a cigarette lighter to ignite the gasoline which he had thrown on the victim. A defendant's lack of candor reflects poorly on the Defendant's rehabilitation potential. It is therefore a proper consideration by the trial court in determining whether a defendant should receive an alternative sentence. See State v. Zeolia, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996).

Based upon our review of the record, we conclude that the trial court did not err or abuse its discretion by denying the Defendant full probation.

Although we conclude that the trial court acted within its discretionary authority in ordering split confinement, the Defendant was sentenced as a Range I, standard offender to a term of one year. As such, the Defendant is entitled to have the remainder of his sentence suspended upon reaching his release eligibility date. See Tenn. Code Ann. § 40-35-501(a)(3). As pointed out by the Defendant in his brief, the trial court ordered that the Defendant serve fifty percent of his sentence—six months—in confinement prior to being released. This Court has previously concluded that the period of time ordered to be served in split confinement may not exceed the Defendant's release eligibility date. See State v. Glynnon Bradshaw, No. 01C01-9810-CR-00439, 1999 WL 737871, at *2 (Tenn. Crim. App., Nashville, Sept. 22, 1999). The release eligibility date for a Range I, standard offender receiving a one-year sentence is 3.6 months less certain sentence credits. See Tenn. Code Ann. § 40-35-501(c).

Accordingly, we set the length of split confinement at 3.6 months.

Conclusion

Based upon the foregoing reasoning and authorities, we affirm the sentencing decision of the trial court denying full probation. We remand the case to the Dickson County Circuit Court for entry of a judgment reflecting that the time to be served in split confinement shall be modified from six months to 3.6 months.

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DAVID H. WELLES, JUDGE